Supreme Court, U.S.
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No.

In the Supreme Court of the United States

YUMA ANESTHESIA MEDICAL SERVICES LLC,

Petitioner,

v.

LESTER FLEMING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an independent contractor may maintain an employment discrimination suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

RULE 14.1(b) STATEMENT

The parties to the proceeding below were plaintiff-appellant Lester Fleming and defendant-appellees Yuma Regional Medical Center and Yuma Anesthesia Medical Services. Yuma Regional Medical Center is no longer a party to this action.

RULE 29.6 STATEMENT

Petitioner Yuma Anesthesia Medical Services, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yuma Anesthesia Medical Services LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–16a) is reported at 587 F.3d 938. The district court's order (App., *infra*, 17a–19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2009. On January 12, 2010, Justice Kennedy extended the time for filing the petition for a writ of certiorari to March 22, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Rehabilitation Act of 1973 (29 U.S.C. §§ 794–794a) and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12111–12112) are reproduced in the appendix (App., *infra*, 20a–32a).

STATEMENT

This case involves a recurring issue of national importance that has deeply and openly divided the lower courts. Resolution of the lower court conflict is necessary to define the obligations that recipients of federal funds owe disabled individuals, and the legal standards that govern suits alleging the violation of those obligations.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits recipients of federal funding from

discriminating on the basis of an individual's disability. In general, lawsuits alleging the violation of Section 504 are governed by the standards set forth in Sections 504(a) and 505(a)(2) of the Rehabilitation Act (29 U.S.C. §§ 794(a), 794a(a)(2)) which require that the plaintiff prove that his or her disability was the "sole" cause of the defendant's conduct and that the defendant acted with discriminatory intent. But under Section 504(d) of the Rehabilitation Act (29 U.S.C. § 794(d)), suits alleging "employment discrimination" are governed instead by a different set of standards, namely those set forth in Title I of the Americans with Disabilities Act ("ADA"). Title I of the ADA imposes substantial duties on employers of fifteen or more employees and allows employees of such entities who allege a violation of those duties to prevail even if the employee's disability was simply one "motivating factor" among many for the defendant's conduct and the defendant acted without discriminatory intent.

The lower courts are openly and irreconcilably divided over the extent to which Section 504(d) of the Rehabilitation Act incorporates Title I of the ADA. In the decision below, the Ninth Circuit joined the Tenth Circuit in holding that Section 504(d) incorporates Title I insofar as it defines "the substantive standards for determining *what* conduct violates the Rehabilitation Act" but does not incorporate those aspects of Title I that would "defin[e] * * * *who* is covered under the Rehabilitation Act." App., *infra*, 11a. Thus, under the Ninth and Tenth Circuits' interpretation of Section 504(d), independent contractors and employees of firms with fewer than fifteen employees may bring employment discrimination claims under the Rehabilitation Act—and thus may invoke the substantive standards set forth in Title I

of the ADA—even though Title I, which Section 504(d) incorporates with respect to "complaint[s] alleging employment discrimination," does not cover independent contractors or employees of entities with fewer than fifteen employees.

The Ninth Circuit recognizes that the decision below places it and the Tenth Circuit "in conflict with the Sixth and Eighth Circuits." App., *infra*, 14a. In fact, the decision below is also in conflict with decisions of the D.C. Circuit and the Idaho Supreme Court. In contrast to the Ninth and Tenth Circuits, those courts have held that the Rehabilitation Act does, with respect to employment discrimination claims, incorporate Title I's limitations as to "*who* is covered." *Id.* at 11a. Accordingly, in the Sixth, Eighth, and D.C. Circuits, and in the Idaho state courts, independent contractors—and, by implication, employees of entities with fewer than fifteen employees—may not bring employment discrimination claims under the Rehabilitation Act and may not invoke Title I's substantive standards.

As a result of the conflict in the lower courts, the Rehabilitation Act is applied inconsistently across the country. That inconsistency affects, in the first instance, the substantive obligations imposed on recipients of federal funds. In the Ninth and Tenth Circuits, the duties created by Title I of the ADA—including, for example, the duty to provide part-time or modified work schedules—are owed by all recipients of federal funds, not only those who employ fifteen or more people, and are owed not only to employees, but also to independent contractors. Within the Sixth, Eighth, and D.C. Circuits, recipients of federal funds owe those duties only to their employees, and, presumably, owe those duties only if

they employ more than fifteen people. Given the conflict between the Ninth Circuit and the Idaho Supreme Court on the meaning of Section 504(d), it is unclear what duties are owed to whom by a recipient of federal funds located in Idaho.

The conflict over the meaning of Section 504(d) also affects the legal standards that are applied by courts hearing claims brought under the Rehabilitation Act. In the Ninth and Tenth Circuits, independent contractors and employees of entities with fewer than fifteen employees who bring employment discrimination claims under Section 504 are able to invoke the standards of Title I of the ADA and thus need only prove that their disability was a "motivating factor" in the defendant's conduct and that the defendant's conduct had a discriminatory effect. In the Sixth, Eighth, and D.C. Circuits and in the Idaho state courts, by contrast, independent contractors and, by implication, employees of entities with fewer than fifteen employees cannot invoke Title I and must therefore prove both that their disability was the "sole" cause of the defendant's conduct and that the defendant acted with discriminatory intent.

Which substantive duties are imposed and which legal standards are applied will be outcome determinative in many cases. In this case, the Ninth Circuit held that the respondent, an independent contractor, could bring an employment discrimination claim under Section 504 of the Rehabilitation Act. Had respondent brought suit within the Sixth, Eighth, or D.C. Circuits, or in Idaho state court, his claim would surely have been dismissed.

This Court should put an end to the lower courts' long-standing and ever-deepening division over the proper interpretation of Section 504(d). Because the

facts "are simple and not contested" (App., *infra*, 2a), this case presents an ideal vehicle for resolving that conflict—a conflict that merits this Court's attention because it involves an important and recurring question of federal statutory construction.

A. Statutory Background

1. Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Section 505 of the Rehabilitation Act makes "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" available to anyone whose rights under Section 504 have been violated. 29 U.S.C. § 794a(a)(2). Accordingly, Section 504 is enforceable through an implied private right of action. See, *e.g.*, *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 206 n.2 (3d Cir. 2009) ("Since Congress has incorporated Title VI's remedial scheme into the Rehabilitation Act, plaintiffs alleging violations of Section 504 have a private right of action under federal law.").

Section 504 contemplates two categories of enforcement actions—those "alleging employment discrimination" (29 U.S.C. § 794(d)) and all others.

Complaints that do not allege employment discrimination are governed by the standards set forth in Section 504(a) and those incorporated through Section 505(a)(2), which together set a high bar for recovery. The courts of appeals have strictly construed Section 504(a)'s causation standard, which requires proof that the alleged discrimination oc-

curred "solely by reason of" the plaintiff's alleged disability. 29 U.S.C. § 794(a). As the Eleventh Circuit has explained, Section 504 plaintiffs must show not merely that their disability was a "but for" cause of the alleged discrimination, but that it was in fact the "*sole[]*" cause. *Severino* v. *N. Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1183 (11th Cir. 1991) (emphasis added); see also, *e.g.*,. *Amir* v. *St. Louis Univ.*, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999).

Similarly, because a plaintiff's implied right of action is conferred through incorporation of "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" (29 U.S.C. § 794a(a)(2)), which in turn requires that compensatory damages be supported by proof of discriminatory intent (see *Alexander* v. *Sandoval*, 532 U.S. 275, 281 (2001); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983)), every court of appeals to consider the question has concluded that a plaintiff seeking compensatory damages under Section 504(a) for non-employment discrimination "must prove a *mens rea* of 'intentional discrimination.'" *Mark H.* v. *Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) (quoting *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001)); accord *Powers* v. *MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) (collecting cases holding the same); *Wood* v. *President & Tr. of Spring Hill College in the City of Mobile*, 978 F.2d 1214, 1219 (11th Cir. 1992).

Complaints that allege employment discrimination, on the other hand, are governed by Section 504(d), which provides that "[t]he standards used to determine whether [Section 504] has been violated in a complaint alleging employment discrimination * * * shall be the standards applied under Title I of

the Americans with Disabilities Act of 1990 * * *, as such sections relate to employment." 29 U.S.C. § 794(d). The Title I standards incorporated by Section 504(d) with respect to employment discrimination claims differ in several important respects from the standards applicable to all other claims under Section 504.

Unlike the causation standard set forth in Section 504(a), which requires proof that the discrimination occurred "*solely* by reason of" the plaintiff's disability (29 U.S.C. § 794(a) (emphasis added)), Title I prohibits *all* "discriminat[ion] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Thus, Title I of the ADA—and, by extension, presumably Section 504(d) of the Rehabilitation Act—does not require proof that the plaintiff's disability was the exclusive cause of the defendant's allegedly discriminatory conduct, but instead merely proof that disability was one "motivating factor" (among perhaps many) for the defendant's conduct. *Martin* v. *Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1048 (9th Cir.), cert. denied *sub nom*, *Estate of Martin* v. *Cal. Dep't of Veterans Affairs*, 130 S. Ct. 299 (2009) (quoting *Head* v. *Glacier Nw. Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005)); *Parker* v. *Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000).

Furthermore, in contrast to Title VI of the Civil Rights Act, which prohibits only intentional discrimination and which by virtue of its incorporation through Section 505(a)(2) otherwise applies to claims under Section 504, Title I of the ADA also forbids the use of "standards, criteria, or methods of administration" that "have the *effect* of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3) (emphasis added). Thus, under Title I of the ADA—and, there-

fore, presumably under Section 504(d) of the Rehabilitation Act—"'a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate." *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52–53 (2003) (alterations omitted) (quoting *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 645–646 (1989), superseded by statute on other grounds, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–1075 (codified as amended at 42 U.S.C. § 2000e-2(k))).

In addition to containing causation and *mens rea* standards that are significantly different than those that apply to non-employment discrimination claims brought under Section 504(a), Title I of the ADA also expressly prohibits a range of specific conduct that is not similarly barred under Section 504(a). For instance, Title I includes privacy and confidentiality provisions that define discrimination to include inquiries about applicants' or employees' disabilities (42 U.S.C. § 12112(d)(4)(A)) and disclosures of information concerning such disabilities, when acquired (42 U.S.C. § 12112(d)(3)(B)). By contrast, inquiries and disclosures concerning an individual's disability do not constitute independent violations of Section 504(a) because they are not, of themselves, "exclu[sions]" from "participation in" a "program or activity receiving Federal financial assistance" and are not otherwise deemed to constitute "discrimination" within the meaning of Section 504(a). 29 U.S.C. § 794(a); cf. *id.* § 705 (defining terms as used in the Rehabilitation Act). Similarly, in contrast to Section 504(a), Title I specifically requires "making reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)), such as "making existing facilities * * * readily accessible to" disabled individuals and providing them

"part-time or modified work schedules" (42 U.S.C. § 12111(9)(A)–(B)).

Finally, of particular relevance here, the employment-related duties imposed by Title I, unlike the general anti-discrimination provisions found in Section 504(a), are owed only by entities that employ fifteen or more people and then only to such entities' employees and applicants. See 42 U.S.C. § 12112 (prohibiting discrimination by "covered entit[ies]" against "qualified individual[s]"); *id.* § 12111(2), (5) (defining "covered entity" as "an employer" "who has 15 or more employees"); *id.* § 12111(8) (defining "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"). Consistent with these definitional limitations, every court of appeals to consider the question has concluded that Title I protects employees and applicants for employment, but not independent contractors. See *Aberman* v. *J. Abouchar & Sons, Inc.*, 160 F.3d 1148, 1150 (7th Cir. 1998); *Johnson* v. *City of Saline*, 151 F.3d 564, 567–569 (6th Cir. 1998); *Birchem* v. *Knights of Columbus*, 116 F.3d 310, 312–313 (8th Cir. 1997); see also *Levinger* v. *Mercy Med. Ctr.*, 75 P.3d 1202, 1208 (Idaho 2003) (same).

2. Congress adopted Section 504(d) of the Rehabilitation Act in 1992, two years after enactment of the ADA. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat 4344. As indicated by its plain terms, Section 504(d) reflected Congress's desire that employment discrimination claims brought under the Rehabilitation Act be sub-

ject to the same standards as employment discrimination claims brought under Title I of the ADA.[1]

Section 504(d)'s application of the standards of Title I of the ADA to private employment discrimination claims brought under Section 504 of the Rehabilitation Act mirrors Congress's directive in Title I itself that agencies authorized to enforce the two statutes "shall develop procedures to ensure that administrative complaints filed under [Title I] and under the Rehabilitation Act of 1973 are dealt with in a manner that * * * prevents imposition of inconsistent or conflicting standards" under the two provisions. 42 U.S.C. § 12117(b). See also H.R. Rep. No. 101-596, at 66 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 565, 575 (expressing Congress's intent that the ADA and the Rehabilitation Act be interpreted so as to avoid "inconsistent, conflicting standards"); H. Rep. No. 101-485(II), at 31–39 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 336–334 (explaining that Title I was intended to prohibit employment discrimination according to standards "[c]onsistent with regulations implementing section 504 of the Rehabilitation Act of 1973," including, for example, use of "comparable * * * definition[s]").

The enactment of Section 504(d) was meant to eliminate any remaining inconsistencies between the two statutory schemes. At the same time subsection

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[1] The Rehabilitation Act and the ADA are not redundant because their respective scopes, although overlapping, are not coextensive. The Rehabilitation Act applies to all recipients of federal funds without regard to their effect on commerce. The ADA applies to all employers of more than fifteen employees in industries affecting commerce without regard to their receipt of federal funds. Cf. App., *infra*, 6a–7a.

(d) was added to Section 504 of the Rehabilitation Act, virtually identical language was added, as subsection (g) to Section 501 of the Rehabilitation Act, which governs employment discrimination by the federal government, and as subsection (d) to Section 503, which governs employment discrimination by federal contractors. See 29 U.S.C. §§ 791(g), 793(d), 794(d). As the Senate report for the Rehabilitation Act Amendments of 1992 explains, the language was "included in order to ensure uniformity and consistency of interpretations" between the Rehabilitation Act and Title I of the ADA. S. Rep. No. 102-357, at 16, 71 (1992), reprinted in 1992 U.S.C.C.A.N. 3712, 3727, 3782. Accordingly, the courts of appeals have generally recognized that Section 504 and Title I "impose identical obligations upon employers," treating the two as "twin statutes" with regard to employment discrimination suits. *Garcia* v. *S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113 n.3 (2d Cir. 2001) (quoting *Kilcullen* v. *N.Y. State Dep't of Labor*, 205 F.3d 77, 82 (2d Cir. 2000)).

B. Factual Background

Petitioner Yuma Anesthesia Medical Services LLC ("YAMS") is a medical practice group that provides anesthesia care in affiliation with the Yuma Regional Medical Center in Yuma, Arizona. YAMS comprises thirteen board-certified anesthesiologists, each of whom is either a shareholder of the company or an independent contractor. YAMS does not have and has never had any employees.

Respondent Lester Fleming is a recent medical school graduate who completed a residency in anesthesiology in 2005. Shortly before completing his residency, Fleming contacted YAMS seeking to join the group as an independent contractor. It is undisputed

that Fleming never applied for employment at, and has never been employed by, YAMS.

YAMS interviewed Fleming and agreed to engage his services. The parties signed a "medical services agreement," according to which Fleming agreed to provide anesthesiology services for YAMS as an independent contractor. After reaching this agreement, the Yuma Regional Medical Center, where all YAMS anesthesiologists practice, began the process of "credentialing" Fleming. Similar to a "background check," credentialing typically involves both verifying a doctor's education, training, licenses, and certifications, and contacting the doctor's prior schools, employers, supervisors, and associates to obtain references.

Although the nature and sequence of events during the credentialing process have not yet been subject to discovery or litigation, certain facts are undisputed for purposes of this appeal. The parties acknowledge, for example, that the credentialing committee received a letter from Fleming's personal physician stating that Fleming had sickle-cell anemia.[2] As part of the credentialing process, the medi-

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[2] Sickle-cell anemia is a life-long genetic blood disorder characterized by red blood cells that assume an abnormal "sickle" shape. Sickling decreases the cells' flexibility and results in a risk of acute clogging of veins and capillaries. Sickle-cell "crises" can restrict blood flow to organs, resulting in often severe pain (both acute and chronic) and organ damage. Sickle-cell crises can severely limit daily activities. Less severe crises are treated with hydration and narcotic pain killers, while more severe crises often require inpatient hospital care. See generally Nat'l Heart, Lung, & Blood Inst., Dep't of Health & Human Servs., *What Is Sickle Cell Anemia?*, http://www.nhlbi.nih.gov/health/dci/Diseases/Sca/SCA_WhatIs.html.

cal center had asked Fleming to disclose if he had any medical conditions that would affect his ability to practice medicine or for which he may need an accommodation. He had responded that he did not.

After YAMS informed Fleming that it had a variety of concerns regarding the results of the credentialing process, Fleming unilaterally terminated the medical services agreement. He later found work in Virginia.

C. Procedural Background

Fleming commenced the present action, alleging that YAMS had committed employment discrimination on the basis of Fleming's sickle cell anemia, in violation of Section 504 of the Rehabilitation Act.[3] The relevant portions of the amended complaint are directed exclusively at employment discrimination, alleging solely that YAMS and Fleming had "executed an employment contract" (1st Am. Compl. ¶¶ 11, 17, 20, reproduced in Appellant's Excerpts of Record ("ER"), at 25–28, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. 07-16427 (9th Cir.)); that YAMS was a "covered entity" (*id.* ¶ 32, ER 29); that YAMS had "refused to hire Dr. Fleming" on the basis of his disability (*id.* ¶ 34, ER 30); and that Fleming had "suffered damages * * * including past and future lost wages" as a result (*id.* ¶ 35, ER 30).

1. YAMS moved to dismiss Fleming's employment discrimination claim on the grounds that Flem-

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[3] The First Amended Complaint also asserted claims under Titles I and II of the ADA, the Arizona Employment Protection Act, and the Arizona Civil Rights Act. Fleming abandoned these claims in subsequent briefing before the district court (App., *infra*, 18a–19a) and has not pursued them on appeal.

ing was an independent contractor and independent contractors cannot maintain such claims under the Rehabilitation Act. The district court denied the motion because at that stage of the proceedings it was "not clear whether the relationship" between YAMS and Fleming "was one of employment or of an independent contractual nature." Order, at 8 (Oct. 16, 2006), Dkt. No. 42, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. 2:05-cv-3906 (D. Ariz.).

After discovery regarding whether Fleming was an employee or independent contractor, YAMS moved for, and the district court granted, summary judgment. App., *infra*, 17a–19a. Noting that Fleming "no longer disputes * * * that he was an independent contractor," the court held that the "protections of the Rehabilitation Act apply to an employee-employer relationship and do not extend to cover independent contractors." *Id.* at 18a–19a (citing *Wojewski* v. *Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006)). Accordingly, the district court dismissed Fleming's employment discrimination claim. *Ibid.*

2. The Ninth Circuit reversed. App., *infra*, 1a–16a. As the Ninth Circuit framed the issue, whether independent contractors such as Fleming can assert employment discrimination claims under the Rehabilitation Act depends on "whether § 504(d), which refers to 'the standards applied under Title of the Americans with Disabilities Act * * * as such sections relate to employment,' incorporates Title I literally or selectively." App., *infra*, 1a. If Section 504(d) incorporates Title I "literally," then, with respect to employment discrimination claims, "the Rehabilitation Act * * * only covers employer-employee relationships." *Id.* at 2a. If, however, Section 504(d) incorpo-

rates Title I only "selectively," then "all individuals," including independent contractors, may bring employment discrimination claims under Section 504. *Ibid.* Recognizing that the circuits that have addressed the question are divided over the issue, the Ninth Circuit acknowledged that "[t]he Sixth and Eighth Circuits have concluded that Title I is incorporated literally, while the Tenth Circuit has concluded that Title I is incorporated selectively." *Ibid.* For its part, the Ninth Circuit—expressly "agree[ing] with the Tenth Circuit"—concluded that Section 504(d) incorporates Title I "selectively" rather than "*in toto*" (*ibid.*), and in particular incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act.'" *Id.* at 11a (quoting *Schrader* v. *Ray*, 296 F.3d 968, 972 (10th Cir. 2002)). In so holding, the Ninth Circuit specifically rejected the contention that Section 504(d) incorporates Title I's definitional provision, 42 U.S.C. § 12111, which expressly limits its reach to individuals who "hold or desire" an "employment position" with an "employer" of "15 or more employees." See App., *infra*, 10a–11a. Accordingly, the Ninth Circuit held that Fleming's employment discrimination suit "under § 504 is proper and his action * * * may proceed." *Id.* at 16a.

The court acknowledged, however, that "our decision puts us in conflict with the Sixth and Eighth Circuits." App., *infra*, 14a. Expressly rejecting the Eight Circuit's holding in *Wojewski* "that § 504(d) *does* incorporate the ADA's employee-employer requirement into the Rehabilitation Act," the panel found the Eighth Circuit's reasoning "not * * * persuasive." *Id.* at 14a–15a (emphasis added) (citing *Wojewski*, 450 F.3d at 345). Similarly, the Ninth Circuit

was "not moved by [the Sixth Circuit's] analysis" in *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999), which "also incorporated, albeit indirectly, the ADA's [employer-employee] limitation into the Rehabilitation Act." *Id.* at 15a.

Despite its express rejection of the reasoning of these other courts, the Ninth Circuit conceded that "there is some force to the position taken by the district court and [YAMS] and endorsed by the Eighth and Sixth Circuits" (App., *infra*, 16a), and admitted that its own decision was "not entirely free from doubt" (*id.* at 6a). The court recognized that section 504(d), which "plainly refers us to Title I of the ADA 'as such sections relate to employment' * * * might be read to suggest that Title I was to be incorporated jot-for-jot into employment discrimination actions brought under the Rehabilitation Act," and that such actions are therefore available only to employees or applicants for employment—and not independent contractors. *Id.* at 16a. According to the Ninth Circuit, however, "this is not the best reading of the Rehabilitation Act." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case cleanly presents a discrete and important question of statutory interpretation that has irreconcilably divided the lower courts. Although the decision below—to allow an independent contractor to bring an employment discrimination claim under the Rehabilitation Act—is supported by a decision of the Tenth Circuit, it squarely conflicts with decisions of the Eighth Circuit and the Idaho Supreme Court, and is in substantial tension with decisions of the Sixth and D.C. Circuits. As a result of this long-standing and expressly-recognized division, the Rehabilitation Act is being applied inconsistently, with

employment discrimination claims either dismissed or allowed to proceed depending on no more than location. The division of authority has even created an intra-state conflict: in Idaho, independent contractors are free to bring employment discrimination actions under Section 504 in federal court, but not in state court. Because this case presents an ideal vehicle for resolving this deep and intractable conflict, and because the question presented implicates a recurring issue of great practical importance to the administration of a significant anti-discrimination law, further review by this Court is warranted.

I. THE LOWER COURTS ARE DEEPLY DIVIDED OVER THE EXTENT TO WHICH SECTION 504(d) OF THE REHABILITATION ACT INCORPORATES TITLE I OF THE ADA.

As the Ninth Circuit itself recognized, its decision in this case exacerbates a clear division among the lower courts over the extent to which Section 504(d) of the Rehabilitation Act incorporates Title I of the ADA. On one side of that split stand the Ninth and Tenth Circuits; on the other side, the Sixth, Eighth, and D.C. Circuits and the Idaho Supreme Court. The disagreement is far from academic. Its resolution will determine whether independent contractors—and, by implication, employees of entities with fewer than fifteen employees—can maintain employment discrimination actions under Section 504 of the Rehabilitation Act, and, by extension, whether such individuals are owed the duties set forth in Title I of the ADA.

A. The Ninth and Tenth Circuits Have Held that Section 504(d) Does Not Incorporate Title I's Limitations.

Here, the Ninth Circuit concluded that Section 504(d) incorporates Title I only "selectively" rather than "*in toto*." App., *infra*, 2a. The court specifically rejected the notion that Section 504(d) "adopts those sections of Title I that would restrict the scope of the Rehabilitation Act." *Id.* at 9a. Accordingly, the Ninth Circuit concluded that "all individuals," including independent contractors, may bring employment discrimination claims under Section 504 notwithstanding the undisputed fact that Title I "only covers employer-employee relationships in the workplace." *Id.* at 2a.

In so holding, the Ninth Circuit expressly "agree[d]" with the Tenth Circuit's decision in *Schrader* "that Title I is incorporated selectively" through Section 504(d). *Ibid.* In that case, an employee of a medical services firm brought a Section 504 suit, alleging employment discrimination on the basis of her medical disability. 296 F.3d at 969–970. Because the defendant employer had fewer than fifteen employees, the "central question" in *Schrader* was "whether § 504(d) of the Rehabilitation Act incorporates the ADA's 'fifteen or more employees' definition of employer as a limitation on the definition of entities covered by the Rehabilitation Act" in employment discrimination lawsuits. *Id.* at 970–971. The Tenth Circuit held that it does not. In language quoted with approval by the Ninth Circuit in the decision below (see App., *infra*, 11a), the Tenth Circuit concluded that Section 504(d) incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of

who is covered under the Rehabilitation Act.'" *Schrader*, 296 F.3d at 972. Holding that "§ 504(d) does not incorporate the ADA's definition of 'employer' into the Rehabilitation Act's scope of coverage" (*id.* at 974), the court allowed the lawsuit to proceed.[4]

Although the plaintiff in *Schrader* was an employee rather than an independent contractor like the respondent here, the court's reasoning—according to which Section 504(d) does not incorporate Title I's "scope of coverage" (*ibid.*)—strongly suggests that the Tenth Circuit, like the Ninth, would hold that independent contractors may bring employment discrimination claims under the Rehabilitation Act.

B. Other Circuits and the Idaho Supreme Court Have Held that Section 504(d) Incorporates the Limitations of Title I.

The Ninth Circuit's decision in this case and the Tenth Circuit's decision in *Schrader* are in irreconcilable conflict with decisions of the Eighth Circuit and the Idaho Supreme Court, and in substantial tension with decisions of the Sixth and D.C. Circuits. There is little doubt that if respondent had brought his employment discrimination suit in these other jurisdictions, it would have been dismissed.[5]

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[4] In tension with the Tenth Circuit's decision in *Schrader*, some federal agencies have limited the reach of certain Section 504 requirements to those recipients of federal financial assistance that employ fifteen or more persons, as required under Title I of the ADA. See, *e.g.*, 45 C.F.R. § 84.52(d)(1) (limiting the applicability of certain section 504 regulations to hospitals "that employ[] fifteen or more persons").

[5] District courts within other circuits have sided with the Eighth Circuit, D.C. Circuit, and Supreme Court of Idaho. See,

In *Wojewski*, the Eighth Circuit considered circumstances remarkably similar to those alleged here: a surgeon serving on the staff of a hospital as an independent contractor was terminated when the hospital became concerned that his bipolar disorder was endangering patients. 450 F.3d at 341. The surgeon filed suit, alleging, *inter alia*, employment discrimination under Section 504. The Eighth Circuit affirmed dismissal of the suit. With respect to the Section 504 claim, the court considered the "crucial issue" to be "whether a non-employee can be a qualified individual under § 504" for purposes of employment discrimination actions. *Id.* at 344. It answered that question in the negative, stating that "[g]iven the similarity between Title I and the Rehabilitation Act, * * * we construe both to apply to an employee-employer relationship and decline appellant's invitation to extend coverage of the Rehabilitation Act to independent contractors." *Id.* at 345.[6]

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e.g., *Cortes-Rivera* v. *Dep't of Corr. & Rehab. of P.R.*, 617 F. Supp. 2d 7, 25 (D.P.R. 2009) (applying *Wojewski* to dismiss an employment discrimination claim by an independent contractor); c.f. *McGovern* v. *MVM, Inc.*, No. Civ.A.04-2541, 2004 WL 2554565, at *2 (E.D. Pa. Nov. 9, 2004) (dismissing employment discrimination claim brought under the Rehabilitation Act because the plaintiff was an "independent contractor" and not an "employee").

[6] Although *Wojewski* might be read to suggest that Section 504 permits *only* employment discrimination lawsuits, and thus grants non-employees no rights of any sort, the Eighth Circuit has subsequently entertained non-employment-related claims under Section 504. See, *e.g.*, *M.P. ex rel. K. and D.P.* v. *Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (holding in a non-employment-related case that the plaintiff there "has a right of action for damages under Section 504"). And district courts have generally interpreted *Wojewski* as standing for the proposition that Section 504 requires an employee-employer relationship for employment discrimination actions, but not other

That conclusion cannot be reconciled with the Ninth Circuit's decision in this case. See App., *infra*, 14a ("our decision puts us in conflict with the * * * Eighth Circuit").

The decision below also squarely conflicts with the Idaho Supreme Court's decision in *Levinger*, 75 P.3d 1202. Like the respondent in this case, the *Levinger* plaintiff was an independent contractor with a medical practice group that provided anesthesiology services to the local medical center. After he became mentally ill and was involuntarily committed to a psychiatric ward, the medical group terminated his service contract, and the medical center revoked his staff privileges. *Id.* at 1204. Each refused to reengage his services following the completion of his treatment and restoration of his medical license. *Ibid.* The plaintiff filed suit, alleging, among other things, employment discrimination under Section 504. The Idaho Supreme Court affirmed the trial court's grant of summary judgment on that claim. Observing that "the standards found in Title I of the ADA are used to determine whether there has been actionable employment discrimination" under the Rehabilitation Act (75 P.3d at 1208 (citing 29 U.S.C. § 794(d)), and that "the employment discrimination provisions under Title I of the ADA do not protect independent contractors" (*ibid.* (citing *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting)), the court concluded that Levinger, as an independent contractor, "does not have any employment discrimination rights under * * * the Rehabilitation Act" (*ibid.*). That conclusion is, obviously, directly contrary to the decision below.

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actions, under the Rehabilitation Act. See, *e.g.*, *Cortes-Rivera*, 617 F. Supp. 2d at 25.

The decision below is also contrary to the D.C. Circuit's decision in *Redd* v. *Summers*, 232 F.3d 933 (D.C. Cir. 2000). The *Redd* plaintiff was employed by a government contractor that, pursuant to its contract with the government, provided tour guides at the Bureau of Engraving and Printing. Upon her termination, the plaintiff sued the Bureau under Sections 501 and 504 of the Rehabilitation Act. Precisely "because [the plaintiff] was never an employee of the Bureau," the D.C. Circuit affirmed the dismissal of her employment discrimination claim, which the court considered only under Section 501.[7] *Id.* at 936, 941. The court did allow the plaintiff's Section 504 claim to proceed, but that claim, under Section 504(a), was for denial of the opportunity to participate in the tour guide contract, not for employment discrimination. *Id.* at 941.[8] Thus, much as the Idaho

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[7] Section 501, 29 U.S.C. § 791, prohibits disability-based employment discrimination by the federal government. Under D.C. Circuit precedent, Section 501, rather than Section 504, is the exclusive basis for disability-based employment discrimination claims against the federal government. See *Taylor* v. *Small*, 350 F.3d 1286, 1290–1291 (D.C. Cir. 2003) (noting circuit split on issue). But any distinction between Sections 501 and 504 is immaterial for present purposes. Enacted at the same time and using essentially identical language as Section 504(d) (see *supra*, p. 11), Section 501(g) incorporates the standards of Title I of the ADA for purposes of employment discrimination claims brought under Section 501. See 29 U.S.C. § 791(g). Thus, the D.C. Circuit's analysis under Section 501(g) applies fully to Section 504(d).

[8] Without explanation, the *Redd* court stated that the plaintiff could also pursue a claim under Section 504 for having been "retaliated against for protesting" the denial of an opportunity to participate in the tour guide contract. 232 F.3d at 941. But insofar as the Treasury Department regulation cited by the court in support of that statement, 31 C.F.R. § 17.140, is by its

Supreme Court held in *Levinger*, the D.C. Circuit recognized in *Redd* that individuals who are not employees may not bring employment discrimination claims under the Rehabilitation Act, although they may assert claims for other forms of discrimination.

The decision below is also in substantial tension with the Sixth Circuit's decision in *Hiler*, in which the Sixth Circuit considered whether "the Rehabilitation Act creates a private cause of action against supervisors, in their individual capacities, for alleged retaliatory employment practices." 177 F.3d at 544. The Sixth Circuit held that it does not because "individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the Rehabilitation Act" for employment discrimination. *Id.* at 547. The Ninth and Tenth Circuits have each acknowledged that *Hiler*'s holding is contrary to their decisions in this case and *Schrader*, respectively. See App., *infra*, 14a–15a ("our decision puts us in conflict with the Sixth * * * Circuit" which has "incorporated, albeit indirectly, the ADA's [employee-employer] limitation into the Rehabilitation Act"); *Schrader*, 296 F.3d at 974 ("Although we believe that * * * § 504(d) does not incorporate the ADA's definition of 'employer' into the Rehabilitation Act's scope of coverage, we recognize that the Sixth Circuit

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terms limited to "discrimination in employment." Inasmuch as Section 504 itself bars retaliation only insofar as the ADA's anti-retaliation provision is incorporated through Section 504(d) (see *infra*, n.9), the court's off-hand statement is inconsistent with its explicit recognition that the plaintiff, as a non-employee, could not pursue an employment discrimination claim under the Rehabilitation Act. Cf. *Hiler*, 177 F.3d at 547; *infra*, n.9. That apparent confusion is an additional reason why review by this Court is warranted.

reached the opposite conclusion in *Hiler* * * *, albeit with regard to a different issue.").[9]

This Court's intervention is required to resolve the deep division among the lower courts.

II. THE CONFLICT IS UNDERMINING THE UNIFORM APPLICATION OF THE NATION'S DISABILITY DISCRIMINATION LAWS.

If the deep division among the lower courts is allowed to persist, individuals in the Ninth and Tenth Circuits will be able to state claims under the Rehabilitation Act in a far broader range of circumstances, and litigate their claims according to far less demanding standards, than individuals in the Sixth, Eighth, or D.C. Circuits or Idaho state courts. Moreover, within those circuits where Section 504 is interpreted to permit employment discrimination claims by independent contractors and other individuals who may not bring such claims under Title I

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[9] The *Hiler* plaintiff, a government employee, brought claims under Sections 501 and 504 of the Rehabilitation Act. As noted above (see *supra*, n.7), Section 501 prohibits disability-based employment discrimination by the federal government. *Hiler* does not distinguish between the Sections 501 and 504 claims because the relevant provisions of each are identical. Exactly as Section 504(d) does with respect to employment discrimination claims brought under Section 504 of the Rehabilitation Act, Section 501(g) incorporates Title I and "sections 501 through 504" of the ADA with respect to employment discrimination claims brought under Section 501 of the Rehabilitation Act. 29 U.S.C. §§ 791(g), 794(d); see also *supra*, p. 11. Accordingly, Sections 501(g) and 504(d) of the Rehabilitation Act both incorporate, with respect to employment discrimination claims, Section 503(a) of the ADA, the ADA's anti-retaliation provision codified at 42 U.S.C. § 12203(a).

of the ADA, the Rehabilitation Act will, contrary to congressional intent, be applied differently than Title I of the ADA.

A. The Decision Below and the Tenth Circuit's Decision in *Schrader* Impose Duties and Apply Standards Not Imposed or Applied Elsewhere.

The split in the lower courts over the proper interpretation of Section 504(d) means that recipients of federal funding face dramatically different obligations under the Rehabilitation Act depending on location alone. As we have explained (*supra*, p. 8), Title I of the ADA, which Section 504(d) incorporates with respect to employment discrimination claims, imposes certain duties that are not otherwise owed under Section 504(a). For example, entities subject to Title I are required to "mak[e] reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)) for covered individuals, by, for instance providing "part-time or modified work schedules" (42 U.S.C. § 12111(9)(B)). Only in those circuits that have interpreted Section 504(d) as incorporating Title I's standards "for determining *what* conduct violates the Rehabilitation Act" but not Title I's "definition of *who* is covered" (App., *infra*, 11a (quoting *Schrader*, 296 F.3d at 972)), are the duties imposed by Title I owed by all recipients of federal funds, not only those who employ fifteen or more people, and owed not only to employees, but also to independent contractors. Thus, in the Ninth and Tenth Circuits, but not in the Sixth, Eighth, or D.C. Circuits, recipients of federal funds are required to provide independent contractors with the full panoply of accommodations required by Title I.

That geographic disparity in substantive obligations is compounded by a concomitant disparity in the legal standards that are applied to claims brought under Section 504. As we explained above (*supra*, pp. 5–8), complaints under Section 504 alleging employment discrimination are subject to different standards than complaints alleging other forms of discrimination.

Employment discrimination claims are, by virtue of Section 504(d), subject to the standards of Title I of the ADA. With respect to causation, all that Title I requires is proof that the plaintiff's disability was one "motivating factor" (among perhaps many) for the defendant's conduct. *Martin*, 560 F.3d at 1048. Moreover, because Title I forbids practices that "have the *effect* of discrimination on the basis of disability" (42 U.S.C. § 12112(b)(3) (emphasis added)), a plaintiff able to invoke its standards need not prove a "subjective intent to discriminate." *Raytheon*, 540 U.S. at 52–53.

Complaints that do not allege employment discrimination are, by contrast, governed by the standards set forth in Section 504(a) and incorporated through Section 505(a)(2). Under Section 504(a), a plaintiff must prove that the alleged discrimination occurred "*solely* by reason of" the plaintiff's disability. 29 U.S.C. § 794(a) (emphasis added); see also *Severino*, 935 F.2d at 1183. Similarly, because the implied right of action conferred through Section 505a(a)(2)'s incorporation of "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" (29 U.S.C. § 794a(a)(2)) requires proof of discriminatory intent (see *Sandoval*, 532 U.S. at 281; *Guardians Ass'n*, 463 U.S. at 584), a plaintiff seeking compensatory damages under Sec-

tion 504(a) for non-employment discrimination "must prove a *mens rea* of 'intentional discrimination.'" *Mark II.*, 513 F.3d at 938 (quoting *Duvall*, 260 F.3d at 1138) accord *Powers*, 184 F.3d at 1153; *Wood*, 978 F.2d at 1219.

Thus, whether an individual is entitled to bring an "employment discrimination" claim under Section 504 has significant implications for what the plaintiff must prove in order to prevail under that provision. In the Ninth and Tenth Circuits, independent contractors and employees of entities with fewer than fifteen employees are—thanks to *Schrader* and the decision below—able to bring employment discrimination claims under Section 504, and are thus presumably able to invoke the standards of Title I, which allows them to prevail so long as their disability was a "motivating factor" in the defendant's conduct and the defendant's conduct had a discriminatory effect.[10] But in the Sixth, Eighth, and D.C. Circuits, and in the Idaho state courts, independent contractors and, by implication, employees of entities with fewer than fifteen employees, cannot bring "employment discrimination" claims under Section 504, and are therefore unable to invoke the stan-

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[10] We say such individuals are "presumably" able to invoke the standards of Title I because the circuits are divided over whether Section 504(d) incorporates Title I's "motivating factor" standard with respect to Section 504 employment discrimination actions. The First Circuit has applied the "motivating factor" standard to employment discrimination claims under Section 504. See, *e.g.*, *Oliveras-Sifre* v. *P.R. Dep't of Health*, 214 F.3d 23, 25 & n.2 (1st Cir. 2000). The Fifth Circuit, however, has held that the "motivating factor" standard does not apply, notwithstanding Section 504(d). See *Soledad* v. *U.S. Dep't of Treasury*, 304 F.3d 500, 503–505 (5th Cir. 2002). Neither the Ninth nor the Tenth Circuit has spoken to this issue.

dards of Title I, with the consequence that they, if they are to prevail, must prove both that their disability was the "sole" cause of the defendant's conduct and that the defendant acted with discriminatory intent.

B. The Decision Below and the Tenth Circuit's Decision in *Schrader* Undermine Congress's Intent that the Rehabilitation Act and the ADA Be Applied Consistently.

Congress enacted Section 504(d)—and the virtually identical provisions found in Sections 501(g) and 503(d), 29 U.S.C. §§ 791(g), 793(d)—to ensure that employment discrimination claims would be treated consistently, whether they were brought under the Rehabilitation Act or under Title I of the ADA. See *supra*, pp. 9–11. As the accompanying Senate report explained, the language was "included in order to ensure uniformity and consistency of interpretations" between the two statutes. S. Rep. No. 102-357, at 16, 71.

But *Schrader* and the decision below defeat that goal. It is well-established that neither independent contractors nor employees of entities with fewer than fifteen employees can bring employment discrimination claims under Title I of the ADA. See *Clackamas Gastroenterology Assocs.* v. *Wells*, 538 U.S. 440, 441–442 (2003); *Aberman*, 160 F.3d at 1150; *Johnson*, 151 F.3d at 567–569; *Birchem*, 116 F.3d at 312–313. Yet, in the Ninth Circuit, and likely in the Tenth Circuit as well, independent contractors *can* bring employment discrimination claims under the Rehabilitation Act, as can employees of entities with fewer than fifteen employees.

C. The Conflict Affects Large Sectors of the Economy.

The question presented by this case affects many, probably millions, of people and entities throughout the country.

The Rehabilitation Act applies to all recipients of federal funding (see 29 U.S.C. § 794(a)–(b)), an already large class that has grown even larger in recent times as the federal government distributes financial assistance and stimulus money to combat the current economic recession. Cf. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 613; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 303. For example, entities covered by the Rehabilitation Act include not only most of the nation's hospitals, which participate in the Medicare and Medicaid programs (see *United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1040 (5th Cir. 1984)), and universities, which participate in student financial aid programs (cf. *Bennett-Nelson* v. *La. Bd. of Regents*, 431 F.3d 448, 452–453 (5th Cir. 2005)), but also most of the nation's airports, which receive assistance through the Airport and Airway Trust Fund (see Fed. Aviation Admin., *Airport and Airway Trust Fund (AATF)*, http://www.faa.gov/about/office_org/headquarters_offices/acp/aatf/), and two of the nation's three auto makers, which have received assistance through the Troubled Asset Relief Program (see U.S. Dept. of the Treas., Office of Financial Stability, *Citizens' Report: On the Troubled Asset Relief Program (TARP)*, at 8, available at <http://financialstability.gov/docs/09%20OFS_CitizensReport%20MA R2.pdf>).

Recipients of federal funds, like other entities, often retain the services of independent contractors. As

demonstrated by the facts of this case, for example, hospitals frequently utilize physicians retained as independent contractors. Similarly, universities frequently hire visiting scholars and guest lecturers as independent contractors. See, *e.g.*, Brown Univ., *Independent Contractor Policy and Procedures*, http://www.brown.edu/Administration/Controllers_Office/policies/IndependentContractorPolicyProcedures.html. And, like other entities, recipients of federal funds also often use independent contractors to maintain their buildings, to audit their books, and to provide the myriad other professional services that businesses ordinarily hire independent contractors to deliver.

Thus, whether recipients of federal funds owe independent contractors the duties imposed by Title I of the ADA, and whether claims brought by independent contractors under the Rehabilitation Act will be judged by the standards of Title I, are questions that affect innumerable entities and individuals across the country. Inasmuch as several circuits and a state court of last resort have rendered conflicting decisions on "the same important matter" of federal statutory interpretation (S. Ct. R. 10(a)), review by this Court is warranted.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT.

This case offers an ideal vehicle for resolving the widespread, long-standing, and expressly-recognized conflict among the lower courts over the extent to which Section 504(d) of the Rehabilitation Act incorporates Title I of the ADA.

There is no doubt that this case squarely presents that conflict. The district court dismissed respondent's suit in express reliance on the Eighth

Circuit's decision in *Wojewski*. App., *infra*, 19a. The Ninth Circuit reinstated respondent's suit, expressly rejecting *Wojewski* and the Sixth Circuit's decision in *Hiler* in favor of the Tenth Circuit's contrary decision in *Schrader*. *Id.* at 2a, 14a–16a, Thus, the outcome of this case depends on how the conflict is resolved.

Moreover, as the Ninth Circuit noted below, "the facts of this case are simple and not contested." *Id.* at 2a. Respondent has conceded that he was an independent contractor (*id.* at 18a); the only claim respondent asserts under Section 504 of the Rehabilitation Act is one alleging employment discrimination (1st Am. Compl., ER 22–33; App., *infra*, 3a); and that claim is the only claim remaining in the case (App., *infra*, 18a–19a).

In short, this case cleanly presents an important question of considerable practical importance that has divided the lower courts. Accordingly, the petition should be granted.

IV. THE NINTH CIRCUIT ERRED.

Review is also warranted because the Ninth Circuit plainly erred in holding that independent contractors may bring employment discrimination claims under Section 504 of the Rehabilitation Act notwithstanding Section 504(d)'s incorporation of the standards of Title I of the ADA. The decision below is wrong for several reasons.

As an initial matter, it is illogical to allow *employment* discrimination claims by independent contractors, who are, by definition, *not* employees. See, *e.g.*, *Hunt* v. *Mo. Dep't of Corr.*, 297 F.3d 735, 740 (8th Cir. 2002) (noting "well-established rule that independent contractors are not employees").

Logic aside, the Ninth Circuit's decision cannot be reconciled with Section 504(d), which provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act." 29 U.S.C. § 794(d). Title I of the ADA plainly applies only to employers and employees, not to independent contractors and those who contract for their services. See *Aberman*, 160 F.3d at 1150; *Johnson*, 151 F.3d at 567–569; *Birchem*, 116 F.3d at 312–313. That limitation is an inextricable element of the standards applied under Title I, and thus, by virtue of Section 504(d), necessarily applies equally to employment discrimination claims brought under Section 504 of the Rehabilitation Act.

The decision below rests on the conclusion that Section 504(d) incorporates Title I "selectively" rather than "*in toto*," and in particular incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act.'" App., *infra*, 11a (quoting *Schrader*, 296 F.3d at 972). The Ninth Circuit reached its conclusion in part because it could "find no language in § 504(d) that explicitly adopts *those sections* of Title I that would restrict the scope of the Rehabilitation Act." *Id.* at 9a (emphasis added). But, contrary to the Ninth Circuit's implicit assumption, the provisions of Title I that restrict its scope to employees are not discrete "sections" susceptible to "selective[]" exclusion from incorporation. On the contrary, the Title I standards are, by their own terms, necessarily limited to the employer-employee context. Thus,

Title I's general anti-discrimination standard provides that

> [n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). It is clear on its face that this standard covers only employees and applicants for employment—there is simply no way to make sense of phrases like "the hiring * * * of employees" "employee compensation," and "terms, conditions, and privileges of employment" outside that context.

Moreover, it is impossible to understand what Title I's anti-discrimination standard requires without knowing how Congress defined the terms "covered entity" and "qualified individual." Title I defines the term "covered entity" to mean, in relevant part, "an employer" (42 U.S.C. § 12111(2)), and defines the term "qualified individual" to mean, in relevant part, "an individual with a disability who * * * can perform the essential functions of the employment position that such individual holds or desires" (42 U.S.C. § 12111(8)). Plainly there is no way to apply § 12112(a) without reference to these definitions—they are bound up in the standard itself. Accordingly, the Ninth Circuit was wrong to conclude that Section 504(d) incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act.'" App., *infra*, 11a (quoting *Schrader*, 296 F.3d at 972).

The decision below, which applies different standards to employment discrimination claims brought under the Rehabilitation Act than to those brought under Title I of the ADA, is also wrong for another reason—it ignores Congress's intent that Section 504 and Title I be implemented in such a way as to ensure that "actions which allege employment discrimination under [Title I] and under the Rehabilitation Act" be treated in a manner that "prevents imposition of inconsistent or conflicting standards" under the two provisions. 42 U.S.C. § 12117(b). It also takes no account of Congress's purpose in enacting Section 504(d) itself: "to ensure uniformity and consistency of interpretations" between the Rehabilitation Act and Title I of the ADA. S. Rep. No. 102-357, at 16, 71.

Thus, the plain language and legislative histories of both Section 504(d) and Title I indicate that Congress intended to create a single, uniform standard to govern all disability-related employment discrimination claims, whether brought under Section 504 of the Rehabilitation Act or Title I of the ADA. This Court's review is necessary—not only to resolve the deep and long-standing conflict among the lower courts, but also to vindicate Congress's express intention that Title I of the ADA and Section 504 of the Rehabilitation Act be applied in a consistent manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2010

APPENDICES

APPENDIX A:
THE NINTH CIRCUIT'S OPINION

* * *

United States Court of Appeals,
Ninth Circuit.

Lester FLEMING, Plaintiff-Appellant,
v.
YUMA REGIONAL MEDICAL CENTER; Yuma Anesthesia Medical Services, Defendants-Appellees.

No. 07-16427.

Argued and Submitted Feb. 12, 2009.
Filed Nov. 19, 2009.

Before: RONALD M. GOULD and JAY S. BYBEE, Circuit Judges, and TIMOTHY TYMKOVICH,* Circuit Judge.

BYBEE, Circuit Judge:

This case presents a question of first impression in our court: Does § 504 of the Rehabilitation Act, 29 U.S.C. § 794, extend to a claim of discrimination brought by an independent contractor? In order to answer that question, we must decide whether § 504(d), which refers to "the standards applied under Title I of the Americans with Disabilities Act * * * as such sections relate to employment," incorporates Title I literally or selectively. If Title I is incor-

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* The Honorable Timothy Tymkovich, United States Circuit Judge for the Tenth Circuit, sitting by designation.

porated literally, then the Rehabilitation Act is limited by the ADA and only covers employer-employee relationships in the workplace; if selectively, then the Rehabilitation Act covers all individuals "subject to discrimination under any program or activity receiving Federal financial assistance," who may bring an employment discrimination claim based on the standards found in the ADA. 29 U.S.C. § 794(a). The Sixth and Eighth Circuits have concluded that Title I is incorporated literally, *Wojewski* v. *Rapid City Reg'l Hosp.*, 450 F.3d 338 (8th Cir. 2006); *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999), while the Tenth Circuit has concluded that Title I is incorporated selectively. *Schrader* v. *Ray*, 296 F.3d 968 (10th Cir. 2002). We agree with the Tenth Circuit, and conclude that § 504 incorporates the "standards" of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I *in toto*, and therefore the Rehabilitation Act covers discrimination claims by an independent contractor. Accordingly, we reverse the judgment of the district court.

I

For purposes of this appeal, the facts of this case are simple and not contested. Dr. Lester Fleming is an anesthesiologist who suffers from sickle cell anemia. In 2005, Fleming applied for a position as an anesthesiologist at the Yuma Regional Medical Center ("Yuma"). Upon learning of Fleming's sickle cell anemia, Yuma told him that it would not be able to accommodate his operating room and call schedules. Fleming declined to accept this condition of employment, effectively canceling the contract.

Fleming brought suit against Yuma[1] for breach of his employment contract and employment discrimination in violation of § 504 of the Rehabilitation Act. The district court granted summary judgment in Yuma's favor, ruling that (1) Fleming was an independent contractor, and that (2) independent contractors are not protected by the Rehabilitation Act. Fleming appeals the ruling that the Rehabilitation Act does not apply to independent contractors; he does not, however, appeal the district court's finding that he is an independent contractor.[2]

II

The Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, was the "first major federal statute designed to protect the rights of * * * the handicapped people of this country." *Smith* v. *Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990); *see also Consol. Rail Corp.* v. *Darrone*, 465 U.S. 624, 626, 104 S. Ct. 1248, 79 L.Ed.2d 568 (1984) (describing the Act as "a comprehensive federal program aimed at improving the lot of the handicapped"). Section 504 creates a private right of action for individuals subjected to disability discrimination by any program or activity receiving federal financial assistance, *Kling* v. *Los Angeles County*, 633 F.2d 876, 878 (9th Cir. 1980), including employment discrimination in such programs, *Consol. Rail*, 465 U.S. at 632, 104 S. Ct. 1248; *Boyd* v. *U.S. Postal*

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[1] Fleming also brought suit against Yuma Anesthesia Medical Services ("YAMS"). The distinction between Yuma and YAMS is not relevant for the purposes of this appeal. We therefore will refer to the defendants collectively as "Yuma."

[2] We review a district court's grant of summary judgment *de novo*. *United States* v. *City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003).

Serv., 752 F.2d 410, 413 (9th Cir. 1985). It provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The Rehabilitation Act broadly defines "program or activity" to include "all of the operations of – * * * an entire corporation, partnership, or other private organization, or an entire sole proprietorship" if the entity as a whole receives federal assistance or if the entity "is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation," and various other services. 29 U.S.C. § 794(b)(3)(A).

The Rehabilitation Act, as amended, incorporates various standards and remedies from other civil rights laws. Most important for our case, § 504(d) provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act * * * as such sections relate to employment." 29 U.S.C. § 794(d). *See* 42 U.S.C. §§ 12111-17, 12201-04, 12210. Title I of the ADA defines key terms in the act, § 12111, defines discrimination in the workplace, § 12112, provides for defenses and limitations for employees using illegal drugs or alcohol, §§ 12113-14, 12210, and commits enforcement to the Equal Opportunity Employment Commission and the Attorney General, § 12117. Although we have not addressed the question, other circuits have held that independent contractors are not covered by Title I. *Aberman* v. *J. Abouchar & Sons, Inc.*, 160 F.3d 1148, 1150 (7th Cir.

1998); *Johnson* v. *City of Saline*, 151 F.3d 564, 567-69 (6th Cir. 1998); *Birchem* v. *Knights of Columbus*, 116 F.3d 310, 312-13 (8th Cir. 1997).

The issue before us is whether Dr. Fleming, as an independent contractor, may maintain suit against Yuma based on § 504 of the Rehabilitation Act. Fleming urges us to read § 504(d) to mean that "[t]he *standards* " of Title I of the ADA-and not Title I itself-should be "used to determine whether this section has been violated in a complaint alleging employment discrimination." 29 U.S.C. § 794(d) (emphasis added). Relying on the Tenth Circuit's opinion in *Schrader*, Dr. Fleming would have us hold that § 504 does not literally incorporate Title I of the ADA and, therefore, "§ 504(d) addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered." *Schrader*, 296 F.3d at 972.

Yuma, not surprisingly, offers a different view. It would have us hold that § 504(d) incorporates Title I of the ADA *in toto*, including any limitations found in those provisions. Relying on decisions from the Sixth and Eighth Circuits, Yuma argues that "the focus of the Rehabilitation Act is upon providing remedies for individuals who are employees" and therefore the Rehabilitation Act, like Title I of the ADA, "requires an employee-employer relationship." *Wojewski*, 450 F.3d at 345. The district court agreed with Yuma and found that Fleming was not an employee, but an independent contractor. It then held, citing *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692, 121 S. Ct. 1879, 149 L.Ed.2d 904 (2001) (Scalia, J., dissenting), that "[e]mployment actions under the Rehabilitation Act may only be brought by employees and cannot be brought by independent contractors." Thus, Yuma

and the district court would have us read Title I of the ADA into § 504(d) as though Title I had been incorporated on a jot-for-jot basis.

III

Although the matter is not entirely free from doubt, we agree with Dr. Fleming that he is covered by the Rehabilitation Act even though he is an independent contractor. We reach this conclusion for several reasons.

A

First, the scope of the Rehabilitation Act is broader than the ADA.[3] The Rehabilitation Act covers any "otherwise qualified individual" who has been "excluded from the participation in, or denied the benefits of, or * * * subjected to discrimination under any program or activity receiving Federal fi-

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[3] We note that the Rehabilitation Act and the ADA appear to rely on different constitutional footings, which may explain the difference in scope. The Rehabilitation Act, at least insofar as it applies to private entities, draws on Congress's conditional spending power. U.S. Const. art. I, § 8, cl. 1. *See* 29 U.S.C. § 794(a) (regulating "any program or activity receiving Federal financial assistance"); *Constantine* v. *Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 491 (4th Cir. 2005) (explaining that § 504 of the Rehabilitation Act "'invokes Congress' power under the Spending Clause to place conditions on the grant of federal funds.'" (quoting *Barnes* v. *Gorman*, 536 U.S. 181, 186, 122 S. Ct. 2097, 153 L.Ed.2d 230 (2002))) (citation omitted); *see also Barnes*, 536 U.S. at 189-90 & n. 3, 122 S. Ct. 2097. The ADA derives from Congress's power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3; *see* 42 U.S.C. § 12111(5) ("'employer' means a person engaged in an industry affecting commerce"); *United States* v. *Miss. Dep't of Pub. Safety*, 321 F.3d 495, 500 (5th Cir. 2003) (noting that "the ADA is an exercise of Commerce Clause power").

nancial assistance." 29 U.S.C. § 794(a). The Rehabilitation Act covers any program receiving federal funds. The Act carefully defines "program or activity" as " *all* of the operations of" state instrumentalities, colleges and universities, local education agencies, and "an entire corporation, partnership, or other private organization, or an entire sole proprietorship." 29 U.S.C. § 794(b) (emphasis added). This language has led us to interpret "program or activity broadly." *Sharer* v. *Oregon*, 581 F.3d 1176, 1178 (9th Cir. 2009) (quoting *Haybarger* v. *Lawrence County Adult Prob. & Parole*, 551 F.3d 193, 200 (3d Cir. 2008) (internal quotation marks omitted)). Thus, the Rehabilitation Act covers "all of the operations" of covered entities, not only those related to employment.

By contrast, Title I of the ADA prohibits "discriminat[ion] against a qualified individual * * * because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. Title I covers all aspects of the employer-employee relationship, but unlike § 504 of the Rehabilitation Act, it does not cover other relationships, which are addressed elsewhere in the ADA. *See Zimmerman* v. *Or. Dep't of Justice*, 170 F.3d 1169, 1172, 1177-78 (9th Cir. 1999).

B

Second, Congress did not use language of incorporation when it referred to the ADA in § 504. Instead, Congress referred to the " *standards* used to determine whether [§ 504] has been violated in a complaint alleging employment discrimination." 29 U.S.C. § 794(d) (emphasis added). We think the

choice of words is significant. The Supreme Court's decision in *Consolidated Rail Corp.* v. *Darrone* is instructive in this regard. Section 505 of the Rehabilitation Act provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved * * * by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2). In *Consolidated Rail*, Conrail had refused to employ a locomotive engineer who had become disabled, although it did not find him unfit for employment. The engineer brought suit under § 504. Conrail argued that § 604 of Title VI limited employment discrimination actions to those employers who received federal financial assistance so long as the "primary object of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3; *see* 465 U.S. at 628, 104 S. Ct. 1248. Conrail argued that, because § 504 incorporated Title VI, employment discrimination actions under the Rehabilitation Act were limited to those programs receiving funds "to provide employment" and, since the primary objective of the federal assistance received by Conrail was not to provide employment, the engineer could not bring suit under § 504. The Court rejected Conrail's argument:

> It is clear that § 504 itself contains no such limitation. Section 504 neither refers explicitly to § 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under " *any* program or activity receiving Federal financial assistance." And it is unquestionable that the section was intended to reach employment discrimination.

465 U.S. at 632, 104 S. Ct. 1248 (footnote omitted).

The Court in *Consolidated Rail* pointed to two facts: (1) § 504 had a broad definition of covered programs, and (2) although § 504 referred to Title VI, it did not refer "explicitly" to language in § 604 that would have restricted its scope. Similarly, we can find no language in § 504(d) that explicitly adopts those sections of Title I that would restrict the scope of the Rehabilitation Act. When Congress said that the Rehabilitation Act should use the "standards" applicable to employment discrimination claims brought under Title I, we think Congress meant for us to refer to Title I for guidance in determining whether the Rehabilitation Act was violated, but we do not think that Congress meant to restrict the coverage of the Rehabilitation Act.

In *Zimmerman* v. *State Department of Justice*, 170 F.3d 1169 (9th Cir. 1999), we dealt with a similar issue to that presented in *Consolidated Rail* and here: Whether Title II of the ADA, by referring to the Rehabilitation Act, either expressly or impliedly incorporated that act into the ADA. *See* 42 U.S.C. § 12133 (adopting the "remedies, procedures, and rights set forth in section 794a of Title 29"). We held that "Congress' choice to incorporate one section of the Rehabilitation Act, which provides certain procedures, does not demonstrate that Congress also intended to incorporate the rest of the Rehabilitation Act's substance." 170 F.3d at 1179. Following *Zimmerman*'s lead, we decline to hold that because § 504(d) refers to Title I of the ADA, the ADA somehow narrows the scope of § 504(a). As we observed there, under the Rehabilitation Act, "[d]iscrimination is prohibited under any program or activity that receives such [Federal financial] assistance. This fo-

cus naturally encompasses the entire operation of the program or activity, for its federal funding may well flow into compensation for employees," and, we would add, for independent contractors as well. *Id.* at 1181.

C

Third, jot-for-jot incorporation would substantially narrow the scope of the Rehabilitation Act in other ways as well. For example, the ADA's definition of employer, which "means a person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. § 12111(5), would, under Yuma's theory, now govern employment discrimination claims under the Rehabilitation Act. But incorporating that standard would significantly limit the availability of employment discrimination claims under the Rehabilitation Act, a result that seems at odds with Congress's broad definition of "program[s] and activit[ies]" covered by the Rehabilitation Act. 29 U.S.C. § 794(b). Without additional direction from Congress, we are hesitant to reduce the express scope of the Rehabilitation Act by wholesale adoption of definitions from another act. *See Gross* v. *FBL Fin. Servs., Inc.*, --- U.S. ----, 129 S. Ct. 2343, 2349, 174 L.Ed.2d 119 (2009) ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" (quoting *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 128 S. Ct. 1147, 1153, 170 L.Ed.2d 10 (2008))). Ironically, if we adopted the district court's and Yuma's position, we would have to conclude that Congress narrowed the Rehabilitation Act by adopting the ADA. That conclusion contradicts the plain import of those acts,

and we decline to go down that road without a clearer indication that Congress wanted us to.

We find the reasoning of the Tenth Circuit persuasive. In *Schrader* v. *Ray*, the issue was whether § 504(d) of the Rehabilitation Act incorporated the ADA's "'fifteen or more employees' definition of employer as a limitation on the definition of entities covered by the Rehabilitation Act." 296 F.3d at 971. Deciding that it did not, the court adopted the reasoning from *Johnson* v. *N.Y. Hospital*, 897 F. Supp. 83 (S.D.N.Y.1995):

> In enacting the 1992 amendment of the Rehabilitation Act, Congress intended that the standard of "reasonable accommodations" that employers must make under the ADA would serve as the standard in actions alleging Rehabilitation Act violations in the employer-employee context * * *. What the amendment does not state is that the standards of the ADA are to be used to determine whether an employer is even subject to the Rehabilitation Act in the first instance.

Schrader, 296 F.3d at 972 (quoting *Johnson*, 897 F. Supp. at 86). The Tenth Circuit concluded that § 504(d) "addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act." 296 F.3d at 972.

Latching on to the word "substantive," Yuma argues that we are bound by the Supreme Court's more recent decision in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L.Ed.2d 1097 (2006), in which the Court held that the fifteen-employee qualification in Title VII's definition of employer is "subs-

tantive." Yuma contends that: (1) Section 504(d) incorporates Title I's substantive requirements; (2) *Arbaugh* holds that the definition of "employer" is substantive; (3) therefore, § 504 incorporates Title I's definition of "employer." Yuma's argument has two problems. First, Yuma places undue weight on the term "substantive," a term that does not appear in § 504(d). It is true that other circuits have sensibly described the standards referred to in § 504(d) as "substantive,"[4] but that descriptive term tells us little about the scope of the Rehabilitation Act.

The other problem with Yuma's argument is that it equivocates two meanings of "substantive": substantive as opposed to jurisdictional, and substantive as opposed to procedural. In *Arbaugh*, the Supreme Court examined whether Title VII's definition of "employer" as an entity that employs fifteen or more employees is jurisdictional or a "substantive ingredient of a Title VII claim." 546 U.S. at 503, 126 S. Ct. 1235. The Court concluded that the fifteen-or-more-employees requirement concerns the substantive adequacy of the claim and was not a prerequisite for establishing subject matter jurisdiction. *Id.* at 504, 126 S. Ct. 1235. However, the Supreme Court's conclusion that Title VII's definition of employer is substantive rather than jurisdictional does not force the conclusion that the definition is "substantive" rather

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[4] *See McDonald* v. *Pa. Dep't of Pub. Welfare*, 62 F.3d 92, 95 (3d Cir. 1995) ("Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same."); *Myers* v. *Hose*, 50 F.3d 278, 281 (4th Cir. 1995) ("[W]hether suit is filed against a federally-funded entity under the Rehabilitation Act or against a private employer under the ADA, the substantive standards for determining liability are the same.").

than "procedural," or something else. These are different contrast classes.[5] That the Supreme Court determined that the fifteen-employee requirement is a "substantive ingredient" of a Title VII claim does not tell us whether the ADA's definition of employer is part of the ADA's substantive standard for determining when discrimination occurs. *Arbaugh*, therefore, did not address, let alone answer the question before us.

D

Fourth, if we adopted Yuma's reading, there would be substantial duplication between the Rehabilitation Act and the ADA-perhaps inconsistent duplication-in the definitions of key terms. Section 504 refers to 29 U.S.C. § 705(20) for a definition of the term "individual with a disability." Section 705(20) defines that term generally and then creates certain exclusions. It addresses employment in two specific cases. In § 705(20)(C)(v), the Rehabilitation Act provides that "[f]or purposes of [29 U.S.C. §§ 793 and 794] as such sections relate to employment, the term 'individual with a disability' does not include any individual who is an alcoholic" if alcoholism prevents the individual from performing his duties. And § 705(20)(D), for purposes of employment, similarly excludes persons who have a "currently contagious disease or infection" if the disease or infection would "constitute a direct threat to the health or safety" of others. 29 U.S.C. § 705(20)(D).

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[5] As a simple example, one must recognize when seeking directions that right rather than left doesn't necessarily also mean right rather than wrong.

Title I of the ADA has its own provisions relating to "infectious and communicable diseases," 42 U.S.C. § 12113(d), and illegal use of drugs and alcohol, 42 U.S.C. § 12114. If Yuma is correct that Title I is incorporated into the Rehabilitation Act, then either the ADA's exclusions for communicable diseases and illegal use of drugs and alcohol displace the Rehabilitation Act's own exclusions, or we have to harmonize parallel sections. We have not undertaken a side-by-side comparison of the Rehabilitation Act's provisions with those of the ADA in these areas, but the duplication suggests that Congress has established two parallel schemes, which counsels against finding that Congress created one scheme and then displaced it with a second, duplicative scheme.

E

We recognize that our decision puts us in conflict with the Sixth and Eighth Circuits. With all due respect, we do not find their analysis of the Rehabilitation Act persuasive. In contrast to the Tenth Circuit's decision in *Schrader*, the Eighth Circuit held that § 504(d) does incorporate the ADA's employee-employer requirement into the Rehabilitation Act. *Wojewski* v. *Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006). Its brief discussion noted: "Given the similarity between Title I and the Rehabilitation Act, absent authority to the contrary, we construe both to apply to an employee-employer relationship and decline [the] appellant's invitation to extend coverage of the Rehabilitation Act to independent contractors." *Id.* In our view, however, there is no need here to "extend" the Rehabilitation Act; its language is broad enough to cover employees and independent contractors alike. In this respect, Title I and § 504 are quite different. Section 504 does not

even mention employment, while Title I deals exclusively with employment. *Zimmerman*, 170 F.3d at 1176-77. We thus do not find the Eighth Circuit's cursory comparison of § 504 and Title I to be persuasive evidence that the Rehabilitation Act excludes independent contractors.[6]

The Sixth Circuit also incorporated, albeit indirectly, the ADA's limitation into the Rehabilitation Act, holding that "individuals who do not otherwise meet the [Title VII] statutory definition of 'employer' cannot be held liable under the Rehabilitation Act's anti-retaliation provision." *Hiler* v. *Brown*, 177 F.3d 542, 547 (6th Cir. 1999). As an initial matter, the Sixth Circuit's decision in *Hiler* is of dubious relevance to this case because the claim in *Hiler* was brought under § 501 of the Rehabilitation Act-not § 504. *See id.* at 545. Additionally, at issue in *Hiler* was whether the Rehabilitation Act created a private cause of action against supervisors in their individual capacities for retaliation. *Id.* at 543. In concluding that it did not, the Sixth Circuit noted that the ADA and Rehabilitation Act "borrowed the definition of 'employer' from Title VII" and therefore if an individual does not meet the Title VII definition of em-

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[6] The district court and Yuma rely on a statement in Justice Scalia's dissent in *PGA Tour* that Title I "does not protect independent contractors." 532 U.S. at 692, 121 S. Ct. 1879 (Scalia, J., dissenting). The statement, of course, is entirely unexceptional. Title I of the ADA is about employment. *See Zimmerman*, 170 F.3d at 1176 ("Title I contains detailed and comprehensive employment provisions"). The question here is whether the Rehabilitation Act's reference to Title I binds the Rehabilitation Act to the same meaning. For the reasons we have described above, we do not think Justice Scalia's bare observation in his dissent in *PGA Tour* informs the discussion.

ployer, he cannot be liable under the Rehabilitation Act's anti-retaliation provision. *Id.* at 546 n. 5, 547. Though *Hiler* states that the Rehabilitation Act borrowed the definition of employer from Title VII, § 504 specifically defines the entities to which it applies, and does not address employers. *See* 29 U.S.C. §§ 705(20), 794(a), (b). In short, *Hiler* does not speak to the issue in the case before us, and to the extent it does, we are not moved by its analysis.

Finally, although we have rejected it, we recognize that there is some force to the position taken by the district court and Yuma and endorsed by the Eighth and Sixth Circuits. Section 504(d) plainly refers us to Title I of the ADA "as such sections relate to employment." We recognize that such language of referral might be read to suggest that Title I was to be incorporated jot-for-jot into employment discrimination actions brought under the Rehabilitation Act. We also acknowledge that jot-for-jot incorporation is in some respects easier to administer than a selective regime. But our own administrative convenience is not a factor in determining what Congress meant, and for the reasons discussed we have concluded that this is not the best reading of the Rehabilitation Act.

IV. CONCLUSION

We hold that § 504 of the Rehabilitation Act is not limited to employers and employees as defined in Title I of the ADA, but rather applies to independent contractors and the entities that hire them. Fleming's disability discrimination claim under § 504 is proper and his action against Yuma may proceed.

REVERSED.

APPENDIX B:
THE DISTRICT COURT'S ORDER

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dr. Lester Fleming,
Plaintiff,

v.

Yuma Regional Medical Center; Yuma Anesthesia Medical Services,
Defendants.

No. CV 05-3906-PHX-ROS

ORDER

Pending before the Court is Defendant Yuma Anesthesia Medical Services' (YAMS) Motion for Summary Judgment (Doc. #83). For the following reasons, Defendant's Motion is granted.

On October 16, 2006, the Court denied YAMS' Motion to Dismiss, which presented the same argument as YAMS' Motion for Summary Judgment—that Plaintiff's claims under the Rehabilitation Act, the Arizona Civil Rights Act, Americans with Disabilities Act, and Arizona Employment Protection Act fail because Plaintiff was employed by YAMS as an independent contractor and those statutes do not provide relief to independent contractors. At that time, however, the Court concluded that in the light most favorable to Plaintiff, it was unclear whether Plaintiff was an employee of YAMS, or merely an independent contractor. Accordingly, YAMS's Motion to Dismiss was denied.

At this time, however, Plaintiff no longer disputes Defendant's contention that he was an independent contractor, as set forth in his Response to Defendant's Motion for Summary Judgment. Further, Plaintiff does not specifically controvert Defendant's Statement of Facts which alleges that Plaintiff was an independent contractor. Pursuant to Local Rule 56.1, Defendant's Statement of Facts is deemed admitted for purposes of summary judgement. *See* Local Rule 56.1 (stating "[e]ach numbered paragraph of the statement of facts set forth in the moving party's separate statement of facts shall * * * be deemed admitted for purposes of the motion for summary judgment if not specifically controverted by a correspondingly numbered paragraph in the opposing party's separate statement of facts"). Rather, Plaintiff merely maintains that the Rehabilitation Act, 29 U.S.C. § 701 et seq., provides broader protections than the Americans with Disabilities Act which cover his claims against YAMS.

In his Response, Plaintiff provides no argument to controvert Defendant's position that summary judgment should be granted in their favor on Plaintiff's claims under the Arizona Civil Rights Act, Americans with Disabilities Act, and Arizona Employment Protection Act. Since Plaintiff does not dispute that those Acts do not provide relief to independent contractors, summary judgment will be granted in Defendant's favor on counts two, three, four, five, six and seven of Plaintiff's Amended Complaint. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692 (2001) (stating that the Americans with Disabilities Act does not provide relief to independent contractors); A.R.S. § 23-1501 (Arizona Employment Protection Act applies to employees, independent contractors never specifically mentioned and Arizona courts have

never applied the Arizona Employment Protection Act to independent contractors); A.R.S. § 41-1461 (defining employee for purposes of the Arizona Civil Rights Act).

Further, Plaintiff's claims under the Rehabilitation Act also fail. The protections of the Rehabilitation Act apply to an employee-employer relationship and do not extend to cover independent contractors. *Wojewski* v. *Rapid City Regional Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) (stating that the Americans with Disabilities Act and the Rehabilitation Act are interchangeable in many respects, specifically that the Americans with Disabilities Act requires an employee-employer relationship, and the Rehabilitation Act contemplates the same). Thus, summary judgment is granted in Defendant's favor on Plaintiff's remaining claims (one and two).

Accordingly,

IT IS ORDERED THAT Defendant Yuma Anesthesia Medical Services' (YAMS) Motion for Summary Judgment (Doc. #83) is **GRANTED**. The Clerk of Court shall enter judgment in YAMS favor pursuant to Rule 54(b).

IT IS FURTHER ORDERED THAT Defendant's Motion for Summary Judgment (Doc. #81) and Motion for Ruling are **DENIED AS MOOT**.

DATED this 20th day of July, 2007.

/s/
Roslyn O. Silver
United States District Judge

APPENDIX C: RELEVANT EXCERPTS FROM THE REHABILITATION ACT OF 1973

* * *

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) *Promulgation of rules and regulations*

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) *"Program or activity" defined*

For the purposes of this section, the term "program or activity" means all of the operations of –

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in

the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) *Significant structural alterations by small providers*

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) *Standards used in determining violation of section*

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794a. Remedies and attorneys fees.

(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX D: RELEVANT EXCERPTS FROM THE AMERICANS WITH DISABILITIES ACT OF 1990

* * *

42 U.S.C. § 12111. Definitions.

As used in this subchapter:

* * *

(2) *Covered entity*

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * *

(4) *Employee*

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) *Employer*

(A) *In general*

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or pre-

ceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

* * *

(8) *Qualified individual*

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * *

42 U.S.C. § 12112. Discrimination

(a) *General rule*

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation,

job training, and other terms, conditions, and privileges of employment.

(b) *Construction*

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to

ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) *Covered entities in foreign countries*

(1) *In general*

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) *Control of corporation*

(A) *Presumption*

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) *Exception*

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) *Determination*

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) *Medical examinations and inquiries*

(1) *In general*

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) *Preemployment*

(A) *Prohibited examination or inquiry*

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) *Acceptable inquiry*

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) *Employment entrance examination*

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files

and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) *Examination and inquiry*

(A) *Prohibited examinations and inquiries*

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) *Acceptable examinations and inquiries*

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) *Requirement*

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).